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No. 528

In the Supreme Court of the United States

OCTOBER TERM, 1938

UTAH FUEL COMPANY ET AL., PETITIONERS

v.

NATIONAL BITUMINOUS COAL COMMISSION ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL BITUMINOUS COAL COMMISSION

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OPINIONS BELOW

No opinion was entered by the District Court. The opinion of the United States Court of Appeals (R. 23–32) for the District of Columbia, filed December 5, 1938, has not yet been reported.

JURISDICTION

The decree of the Court below was entered December 5, 1938. The petition for a writ certiorari was filed December 16, 1938, and granted December 19, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. May the National Bituminous Coal Commission introduce into evidence at price hearings held by it cost reports filed with its statistical bureaus by coal producers, pursuant to Commission Order No. 15, entered July 15, 1937, or are such reports confidential?

2. Has a district court jurisdiction to enjoin the Commission from permitting disclosure in evidence in its hearings of alleged confidential information?

STATUTE INVOLVED

The provisions of the Bituminous Coal Act of 1937 (50 Stat. 72-90, 15 U. S. C., §§ 828-851), primarily involved are Section 4-II (a), first paragraph, and Section 10 (a), which read as follows:

Section 4-II (a) (first paragraph):

> All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

Section 10 (a):

> The Commission may require reports from producers and may use such other sources of

> information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission* or any court, and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission. [Italics supplied.]

The pertinent provisions of the Bituminous Coal Act are set forth in the Appendix to this brief, *infra*, pp. 48–60.

STATEMENT

On July 15, 1937, the National Bituminous Coal Commission issued its Order No. 15,[1] requiring all producers of coal to file complete reports showing their total costs of production, pursuant to the authority conferred by Section 10 (a) of the Act. The Order contained a provision that—

> The Commission directs specific attention to the provisions of Section 10 of said Act

[1] For the convenience of the Court, Order No. 15 has been printed in full in the Appendix to this brief, *infra*, pp. 37–39. The order is printed in 2 *Fed. Register* 1234.

> relating to the confidential nature of the reports required under this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced.

Copies of this Order and of cost forms 1 and 1A were mailed by the Commission to each known producer within the United States (see Order No. 15, paragraph 3, *infra*, p. 38). The forms sent to producers with the Order contained the following statement in bold type:

> This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential.

On March 30, 1938, the Bituminous Coal Commission issued a Ruling in which it stated that it construed Section 10 (a) of the Act as permitting the introduction in evidence at hearings before the Commission of the cost data of the individual producers and that at the price-fixing hearings subsequently to be held the aforesaid cost data would be made available for introduction in evidence (3 Fed. Register 807). On May 11, 1938, some of the petitioners herein filed a petition with the Commission in which they moved the Commission to vacate the Ruling of March 30, 1938, just described, and to revoke the construction of the Act contained therein. Various producers and consumers sought to intervene in the proceeding thus instituted, the producers supporting the petition filed. The consuming interests, including the Consumers' Counsel established by the statute to represent con-

sumers, argued that any prices fixed would be invalid if the cost data upon which they were based were not revealed to parties to the proceeding.[2]

On May 25 and 26, 1938, a hearing was held, both testimony and oral argument being heard by the Commission itself. On June 1 the Commission handed down an opinion[3] and order (3 Fed. Register 1277) in which it reaffirmed its former Ruling. It decided that Section 10 (a) of the Act authorized disclosure of the reports in hearings, and that in any event such disclosure was necessary to give the parties the full and fair hearing required by the statute and the Constitution.[4] On

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[2] The Commission permitted all the parties seeking to intervene to appear, offer evidence, and participate in the argument at the hearing. It subsequently granted the petitions for leave to intervene filed by producers and municipal corporations, but denied the petitions filed by other consumers. Some of these consumers and the Consumers' Counsel appeared as *amici curiae* in support of the Commission's position in the lower courts, and we understand that certain of the consumers are filing a brief *amici curiae* in this Court.

[3] The opinion is printed in the Appendix, infra, pp. 39–48.

[4] In answer to the argument, renewed here (Petitioner's brief, pp. 71–72), that the Commission makes only a mathematical computation from the cost reports, the Commission found (p. 43, *infra*):

"* * * On the contrary, it appears from the testimony of the representative of the Statistical Division of the Commission that in determining whether certain of the Cost Forms should be returned to producers for correction because of out-of-line or missing items, or in determining whether to accept the cost items as reported, the exercise of judgment and the application of sound statistical practices were employed."

June 1 the Commission issued its order denying the petition and directing the secretary of the Commission (R. 6)—

> to cause the individual cost reports of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required.

On June 6, petitioners before the Commission filed in the United States Court of Appeals for the District of Columbia their petition to review and set aside the Commission's order of June 1, 1938, under Section 6 (b) of the Bituminous Coal Act. The case was argued in the Court of Appeals on June 15. On August 1, the court handed down its opinion holding that the order was not thus reviewable. *Mallory Coal Company* v. *National Bituminous Coal Commission,* 99 F. (2d) 399.

After receiving this decision, the Commission on August 31 entered orders that its secretary make available for inspection for the western minimum price areas beginning on September 10 and for the eastern areas on September 15 the cost reports here involved.[5] The reports were to be available only

[5] The order with respect to the western areas read as follows (R. 7–8):

"1. That the Secretary of the Commission be, and he is hereby, directed to cause the verified cost reports of the individual producers within each of Minimum Price Areas 6, 7,

to "interested parties who have filed appearances in this proceeding" (R. 7–8). The hearing for the western areas was scheduled to begin on September 20; no definite date was set for the eastern areas.

On September 7 petitioners herein filed in the District Court for the District of Columbia their bill of complaint praying that the disclosure of the information pursuant to the orders described above be enjoined (R. 2). The bill prayed for temporary and permanent injunctions and a declaratory judgment (R. 14–15). On September 8 respondents filed a motion to dismiss the bill of complaint (R. 16),[6] and with the consent of the parties that mo-

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9, and 10, submitted to the Commission pursuant to Orders Nos. 15 and 29, to be made available for inspection during business hours on and after September 10th, 1938, at the offices of the Commission, Central Savings Bank Building, Denver, Colorado, by those interested parties who have filed appearances in this proceeding. Notices of appearance may be filed with the Commission at the Secretary's Office, Washington, D. C., or at the Offices of the Commission, Central Savings Bank Building, Denver, Colorado.

"2. The hearing in the matter of the determination of the weighted average of the total costs per net ton of the tonnage produced in Minimum Price Areas 6, 7, 9, and 10 is hereby reopened and notice is hereby given that the Commission will, on the 20th day of September, 1938, at 10:00 A. M. in its hearing room in the Albany Hotel, Denver, Colorado, afford all interested parties further opportunity to introduce affirmative evidence and to cross-examine witnesses as to the correctness of said composite reports heretofore introduced in evidence in this proceeding."

[6] Although the motion to dismiss suggested various other grounds for dismissal, the Commission argued only the merits of the case—the question of statutory construction—in both the District Court and the Court of Appeals.

tion and the motion for a temporary injunction were argued on that day. The District Court upheld the Commission's contention on the merits, and on September 9 entered its order dismissing the bill for failure "to state a cause of action in that the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act of 1937" (R. 18–19). The Commission agreed not to disclose the data in question pending application to the Court of Appeals for an injunction pending appeal. On September 14 that court granted such an injunction against disclosure of the data pending final determination of the appeal.

On October 3, 1938, the case was argued in the Court of Appeals. On December 5th that court handed down its opinion (R. 23–32), in which it held that the question of the District Court's jurisdiction could not be waived (R. 24), that the court had no jurisdiction, and in addition that "the statute being ambiguous and the construction placed thereon by the Commission being a possible one, injunctive relief at this time is not a proper remedy in any event" (R. 29). On December 10th it entered a further order denying a petition for rehearing and granting a stay pending action by this Court, conditioned "upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within ten days" (R. 33). On December 16th, both the petition for certiorari and the

brief in opposition were filed. On December 19th this Court granted certiorari and an injunction against disclosure pending final determination of the proceeding here.

SUMMARY OF ARGUMENT

I. Section 10 (a) of the Bituminous Coal Act in express terms permits disclosure of cost data in evidence in hearings before the Commission. This plain language must be construed to mean what it says. Section 4–II (a) of the Act, which also contains a pledge of confidence but without the exception relating to the use of reports in evidence, is not applicable to the reports here involved, since they were filed pursuant to an order expressly issued under Section 10 (a).

In any event that Section is not inconsistent with Section 10 (a). Its purpose was to prevent indiscriminate disclosure of the data by the Statistical Bureaus or other employees of the Commission. Section 4–II (a) was not intended to give greater protection to cost reports than to the records upon which such reports are based, and these records themselves would be subject to the Commission's power to subpoena them for introduction in evidence in hearings.

Petitioners' arguments that Section 10 (a) should be restricted in meaning to cost reports not filed for use in the fixing of minimum prices is inconsistent with its plain meaning, with the scope of Section 10 viewed as a whole, and with its legisla-

tive history. The effect of the argument would be to exclude from the scope of Section 10 the very information it was primarily designed to protect.

Although it was the purpose of Congress to preserve the secrecy of the reports insofar as was consistent with the effective administration of the Act, Congress also intended the Commission to act solely on the basis of evidence adduced in hearings. These policies are reconciled in Section 10 (a), which excepts use of the data in evidence from the statutory guarantee of confidence.

If there be any doubt as to the proper construction of the Act, the Court should give great weight to the construction adopted by the agency charged with the task of administering it. Particularly should this be the case when an administrative body is endeavoring to construe a statute so as to avoid any attack on the validity of its procedure.

II. The question of the jurisdiction of the District Court is submitted upon the basis of the opinion of the Court of Appeals. The policy of preventing the district courts from interrupting administrative proceedings through injunctions restraining the introduction of evidence, particularly where there is a statute granting the circuit courts of appeals exclusive jurisdiction to set aside administrative orders, should cause the Court carefully to scrutinize the allegations of irreparable injury upon which injunctive relief is sought to be justified. An examination of these allegations here

will demonstrate that the injury is remote, speculative, and conjectural.

ARGUMENT

I

THE ACTS OF THE COMMISSION SOUGHT TO BE ENJOINED ARE AUTHORIZED BY AND NOT IN VIOLATION OF THE STATUTE

A. The Commission is authorized to introduce in evidence cost data reported by producers

Section 2 (a) of the Bituminous Coal Act of 1937 provides in part that—

> No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence shall be conclusive upon review thereof by any court of the United States.

Section 10 (a), the provision which is here controlling, declares that—

> The Commission may require reports from producers * * *. No information obtained from a producer disclosing *costs of production or sales realization* shall be made public without the consent of the pro-

> ducer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission or any court,* and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission. [Italics supplied.]

These two sections together plainly indicate that the Commission's determinations are to be based upon hearings, and that although certain information is generally to be kept confidential, its confidential status shall not prevent its use in evidence in Commission hearings.

Despite petitioners' characterization of the exception in Section 10 (a) as "vague" (Petitioners' brief, p. 39), we can conceive of no language which would more clearly express the intention of Congress. When the words of a statute "are plain, there is no room for construction." *Osaka Shosen Line* v. *United States,* 300 U. S. 98, 101; *United States* v. *Missouri Pac. R. Co.,* 278 U. S. 269, 277–278; *United States* v. *Wiltberger,* 5 Wheat. 76, 95–96; *cf. Wallace* v. *Cutten,* 298 U. S. 229.

Petitioners, however, contend that the first paragraph of Section 4–II (a) of the Act, *infra,* p. 49, precludes the use in evidence of the cost data here involved. Section 4–II (a) requires "code members" (not all producers) to file such "information concerning the preparation, cost, sale, and distribu-

tion of coal as the Commission may authorize or require." That paragraph furthermore provides that "All such records shall be held by the statistical bureau as the confidential records of the code member filing such information."

Order No. 15 was issued under Section 10 (a), not Section 4–II (a).—The first answer to the contention is that Section 4–II (a) is irrelevant, because Order No. 15, under which the material sought to be disclosed was secured, was issued solely under Section 10 (a). Section 4–II (a) applies only to code members. Section 10 (a) authorizes the Commission to require reports from all producers, and Order No. 15 applies to all producers. The bill of complaint concedes that Order No. 15 recites that it was issued "pursuant to authority conferred * * * by Section 10 (a)" (R. 9). The pledge of confidence in the order does no more than incorporate the provisions of Section 10 (not of Section 4–II (a)). The order is specific. It recites (see p. 37, *infra*):

> * * * *pursuant to authority conferred by Section 10 of said Act,* the Commission orders and directs as follows:
>
> 1. That each producer of bituminous coal, *whether or not a code member* and whether or not engaged in commerce in coal which is subject to the provisions of Section 4 of said Act, shall file, in duplicate, complete reports showing the total costs of the tonnage produced * * *.

> The Commission directs specific attention *to the provisions of Section 10 of said Act* relating to the confidential nature of the reports required under this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced. [Italics supplied.]

It is thus plain from the Order itself that the data was required to be furnished pursuant to Section 10 (a) of the Act, and not to Section 4–II (a).

Sections 10 (a) and 4–II (a) are not inconsistent.—The second answer to the contention is that even if Section 4–II (a) is relevant, it is not in conflict with, or more restrictive than, Section 10 (a). The first paragraph of Section 4–II (a) is concerned with the functioning of the statistical bureaus. The paragraph provides that the records are to be kept confidential "by the statistical bureaus." They are not to be revealed to the curious or to competitors seeking to pry into each other's affairs. This section does not attempt, however, to deal with the problem of whether the confidential nature of the records was to preclude their use in hearings before the Commission or in court. Section 4–II (a) certainly does not state in express language that the data could not be so used. Any negative inference to that effect which might arise if the statute were otherwise silent is dispelled by the specific language of Section 10 (a) permitting the use of cost data in hearings. The

latter section, which applies to all producers, code members and non-code members alike, is the all-inclusive section.

That such is the case is apparent if the nature of the statutory guarantee of secrecy is considered. Section 4–II (a) nowhere provides that producers' costs may not be disclosed. At most, even accepting petitioners' arguments as valid, the *cost reports* are to be kept confidential. The Commission has power under Section 8 of the Act to subpoena any documents pertinent to its hearings;[7] it could thus subpoena the original books of petitioners for the purpose of discovering their costs, if the cost reports were not available. The costs themselves are clearly not "trade secrets" or property rights immune from process. *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Commission,* 6 F. (2d) 491, 495. *Cf. Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294. Petitioners would have had no ground for refusing to produce them if they had been subpoenaed for use in the cost proceedings.[8]

The purpose of the statutory pledge of confidence was to assure producers that the cost infor-

[7] The Commission's subpoenas are enforceable in the District Courts. Section 8.

[8] The relevance of such information in proceedings in which the Commission is seeking to determine the weighted average cost of production cannot be questioned. Plainly, however, it is unnecessary for the Commission to introduce the original records in evidence in determining weighted average costs.

mation filed with the Commission would not indiscriminately be made public, and that it would thus have the same privacy as the producers' own books. But it obviously was not intended that the reports filed be protected to a greater extent than the records from which they were taken. Since the Commission, under the Act, unquestionably possesses power to require production of the records (although it certainly need not do so, see footnote 8, p. 15, *supra*), it would be unreasonable to assume that Congress intended to forbid use of the reports in evidence. Congress avoided such an unreasonable limitation by Section 10 (a).

Petitioner's argument that Section 4–II (a) is nullified if the cost reports may be disclosed in evidence at cost hearings under Section 10 (a) is groundless. That section has substantive value if construed to prevent disclosure to favored persons by statistical bureaus or other Commission employees. So construed the section prohibits disclosure of individual producers' reports arbitrarily and thus prevents giving one producer a discriminatory advantage over his competitor. When the reports of all are disclosed simultaneously in hearings no such advantage exists. Moreover, the disclosure in hearings is only to parties to the proceeding (see p. 29, *infra*). Although all consumers [9] might seek to appear at such hearings, only a few, of course, will actually do so.

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[9] Petitioners alleges that injury will result from disclosure to consumers (R. 12–13). See p. 34, *infra*.

Petitioners' arguments are inconsistent with the plain meaning of Section 10 (a).—Petitioners' argument is that Section 4–II (a) is inconsistent with a literal construction of Section 10 (a), and that if the two are read together Section 10 (a) must be regarded as limited to "reports containing information that the Commission may require in order to carry out its duties under the Act, other than its price fixing duties" (Petitioners' brief, p. 45). The argument, put another way, is that petitioners are code members, that Section 4–II (a) establishes the rules governing code members, and that Section 10 (a) cannot be construed as applying to any of the obligations of producers as code members. It is further argued that although the Commission purported to act under Section 10 (a), it had no authority to do so in so far as petitioners are concerned; that the Commission's order could rest only on Section 4–II (a); and that accordingly the reports must be treated as if petitioners had filed them under the latter section instead of the former.

There are many answers to these arguments, but the primary one is that they are inconsistent with the plain meaning of Section 10 (a). That section in terms refers to "producers," and the guarantee of confidence subject to stated exceptions is a guarantee to *producers,* without any of the qualifications or limitations petitioners seek to read into it. "Producer" is defined in Section 17 (c) of the Act as including "*all* individuals, firms, associations,

corporations, trustees, and receivers engaged in the business of mining coal." [Italics supplied.] "Code members" are defined in Section 4 of the Act as meaning "producers accepting membership in the code." Thus Section 10 (a) applies to all producers of coal, including code members. If Congress had intended that section to have as narrow a meaning as that suggested by petitioners, it could easily have limited the section to non-code members, or to reports filed only in administering other parts of the Act than the code set forth in Section 4. Petitioners are here seeking to have the courts read into the statute limitations which Congress did not provide.

The broad scope of Section 10 (a) is shown by an examination of Section 10 as a whole.—A reading of Section 10 as a whole demonstrates clearly that Congress intended it to apply to all reports filed under the Act. The three subdivisions of the section considered together provide a complete system of regulation and enforcement with respect to the reports necessary to the administration of the statute. The first sentence of Section 10 (a) authorizes the Commission to "require reports from producers," and to "require producers to maintain a uniform system of accounting of costs" and other items "as may be required *in the administration of this Act.*" [Italics supplied.] This language indicates that Section 10 (a) was not intended to be limited in scope to those parts of the Act not em-

bodied in the code, as would be the case if petitioners' interpretation were accepted. Section 10 (b) imposes criminal penalties on any officer or employee of the Commission who discloses any information in violation of Section 10 (a). No other section of the Act provides for such penalties. If petitioners' construction of Section 10 were correct, these penalties would not apply to disclosures of cost data to be used in the price fixing process (the data here involved), although there can be no doubt that those were the reports primarily to be protected. Section 10 (c) provides for the forfeiture of fifty dollars a day "if any producers required *by this Act or the code or regulation made thereunder*" [italics supplied] shall fail to file a report. This provision in terms applies to all reports which the Commission may require to be filed, whether under the code or any other part of the statute. It cannot seriously be argued that while the first sentence of subdivision (a) of Section 10 and all of subdivisions (b) and (c) are of general application, Congress intended the second sentence of subdivision (a)—or at least the exception therein here under consideration—to be so limited in scope as to exclude reports used in the fixing of minimum prices.

If this were not otherwise clear it would be manifest from the fact that the most important duty of the Commission under the Act is the fixing of minimum prices. Most of the statute either provides

for or is ancillary to the machinery established for the fixing of such prices. Most reports which have been and will be required under the Act relate to the fixing of such prices. Petitioners have exercised ingenuity [10] in thinking of other possible instances in which cost reports *might* be required; but it is nevertheless obvious, looking at the statute as a whole, that the "information disclosing costs" referred to in Section 10 (a) was primarily intended to mean the cost data filed for use in the establishment of minimum prices.

In fixing minimum prices the Commission must obtain cost reports both from code members and non-code members.—An assumption implicit in petitioners' argument is that only the cost reports of code members need be required by the Commission for the fixing of minimum prices, inasmuch as only code members are bound by the prices established. But this assumption is inconsistent with

[10] See petitioners' brief, pp. 42, 45. The instances suggested where cost reports might conceivably be disclosed all arise under the code (see petitioners' brief, p. 42). If Section 10 (a) authorizes disclosure of reports in hearings held under other portions of the code, it is difficult to see why the section should not also apply to the minimum price provisions. On p. 45 of their brief petitioners have sought to enumerate duties of the Commission outside of the code for which cost reports might be required. It is apparent from petitioners' own statement of these duties that there would be no possible occasion for disclosure of *individual cost reports* in hearings held with respect to any of them. The exception in Section 10 (a) would have had no purpose if limited to such reports.

the very first step in the price-fixing process. The seventh paragraph of Section 4–II (a) provides that "As soon as possible after its creation each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the *ascertainable* tonnage produced in the district in the calendar year 1936." [Italics supplied.] The "ascertainable" tonnage plainly includes that of non-code members as well as of code members. In order that the average costs of the ascertainable tonnage may be determined, cost reports must be obtained both from non-code members and code members.[11]

It was thus necessary that the Commission's order requiring the filing of reports to serve as the basis for the determination of the weighted average cost apply to all producers, and it could only apply to all if it were issued under Section 10 (a). Accordingly, Order No. 15 was issued pursuant to that section. It follows not only that Section 10 (a) does apply to reports used in the fixing of prices but that it *must* apply to the very kind of re-

[11] Not all producers joined the code at once; many acceptances were filed after July 1937, and some are still coming in. If prices were to be based on the average costs of code members only, they would have to be continually revised as code membership changed. Moreover, basing the prices to be fixed on the broadest possible foundation, regardless of code membership, was obviously fair. The wisdom of Congress in providing that average costs should be based on the *ascertainable* tonnage rather than on that of code members is thus amply demonstrated.

ports here involved.[12] The basic premise of petitioner's argument thus falls to the ground.

The legislative history of Section 10 (a) supports the Commission's construction.—That Congress carefully considered the problem raised by the exception to Section 10 (a) here involved is demonstrated by the legislative history of the provision. Section 10 (a) of the Bituminous Coal Act of 1937 is, with one change of great significance, identical with Section 10 (a) of the Bituminous Coal Conservation Act of 1935 (49 Stat. 1005–1006), the act upon which the 1937 statute was largely modeled.[13] The only change made is in the first exception to the requirement that informa-

[12] Petitioners are thus incorrect in arguing (Petitioners' brief, p. 46) that Section 10 (a) could be excised from the statute without interfering with the performance of the Commission's duties under Section 4.

[13] Section 10 (a) of the Bituminous Coal Conservation Act of 1935 read as follows (49 Stat. 991, 1005–1006):

"The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is warranted by a controversy with the producer over any order of the Commission and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission."

tion disclosing costs of production shall not be made public—the very exception here in issue. In the 1935 Act no such information could be made public "except where such disclosure is warranted by a controversy with the producer over any order of the Commission." In the 1937 Act the exception was broadened so as to permit disclosure "in evidence in any hearing before the Commission or any court"—a change which shows that Congress was aware of the necessity of preventing the statutory provisions for secrecy from interfering with the Commission's power to hold full and fair hearings.

That this was the intention of Congress is confirmed by the language of the report of the House Committee on Ways and Means (H. R. Rep. 294, 75th Cong., 1st Sess.). That report stated (p. 8) with respect to Section 10 (a) that—

> Section 10 (a) gives the Commission power to require reports from producers and to require them to maintain a uniform system of accounting of costs, wages, and other matters. Information obtained from the producer which relates to cost and sales realization is to be confidential, and *may be disclosed only with the consent of the producer on in evidence in a hearing before the Commission or a court.* [Italics supplied.]

It should be noted that this statement nowhere indicates that Section 10 (a) is to be given the narrow construction proposed by petitioners here. It is

furthermore significant that the above passage is the only reference to the confidential nature of the cost data in the Committee Reports on the Act;[14] the Committee Reports do not mention the provision in Section 4–II (a) upon which petitioners rely.

Petitioners argued below that Section 10 (a) should still be construed as authorizing disclosure only in connection with a controversy with the particular producer whose reports were to be disclosed. This argument, of course, would give the exception in the 1937 Act the same meaning as that in the 1935 Act, and would nullify the significant change in the language used. Petitioners now renew the argument in slightly different form (Petitioners' brief, pp. 41–42), and suggest that in the 1935 Act disclosure could only be made after the Commission had issued an order, and that the purpose of the change in the 1937 Act was to authorize "disclosure of a cost report of a particular producer prior to the issuance by the Commission of any order, but still only where there was a controversy with such producer." If the purpose of Congress in revising the exception had been merely to extend it to controversies with particular producers before the entry of an order, much narrower language than "in *any* hearing before the Commission" would have been employed. The exception in the 1937 Act

[14] See H. R. Reps. 294, 578 (Conference Report), S. Rep. 252, 75th Cong., 1st Sess.

simply will not bear the construction put upon it by petitioners. This argument, like the others, tries to read into the statutory provision limitations which are not there.

The purposes of Congress.—Petitioners assert that the statute "fairly breathes secrecy" (Petitioners' brief, p. 52) and that Congress intended that the cost reports should never be disclosed in the course of the price-fixing process. There can be no dispute that Congress intended to protect the confidential character of the reports so far as that protection was consistent with the administration of the Act. But an even more important purpose of Congress was that the determinations of the Commission as to fair minimum prices should be based upon evidence introduced at hearings. Section 4–II (a) reflects the subordinate purpose of Congress to give a qualified protection to the confidential character of the reports; Section 2 (a) manifests the primary intention of Congress that the Commission should base its decision on evidence adduced at hearings. Section 10 (a), as amended (see pp. 22–23, *supra*), recognizes both purposes and expressly provides for their reconciliation. It repeats the qualified pledge of confidence but expressly declares that it does not extend to disclosures "made in evidence at any hearing before the Commission." The effect of this section is to clothe the Commission with authority to make any use of the reports in connection with a hearing

which is not inconsistent with the requirement that the hearing be fair and which, in the informed judgment of the Commission, is appropriate or necessary in order that the record of the hearing may provide an adequate basis for the Commission's action.

Effect of administrative interpretation.—If there be any doubt as to the proper construction of the Act, the Court should give great weight to the construction adopted by the agency charged with the task of administering it. As this Court declared in *Brewster* v. *Gage,* 280 U. S. 327, 336:

> It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. *Logan* v. *Davis,* 233 U. S. 613, 627. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 349. *Swendig* v. *Washington Water Power Co.,* 265 U. S. 322, 331.

See also *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315. Particularly should this be the case when an administrative body is endeavoring to construe a statute so as to avoid any attack on the validity of its procedure. Under such circumstances injunctions which will interfere with the administration of a statute should not be granted unless the conduct to be restrained is clearly arbitrary and illegal.

B. The Commission was authorized to make the cost data available for inspection by interested parties

The argument in Point I–A demonstrates that the Commission was authorized by the statute to introduce the cost data in evidence. Petitioners argue that even if this is the case the Commission's orders nevertheless are unauthorized because they provide that the individual cost returns of the petitioners will "be made available for inspection by those interested parties who have filed appearances in this proceeding" (R. 7–8).[15]

The question of whether if the reports may be introduced in evidence they may instead be inspected by the parties to the proceeding does not relate to substance but to form. If the cost reports are introduced into evidence they may be examined by the whole world and not merely by interested parties. Petitioners could not seriously and do not in fact contend that they would be injured any more if the reports were made available for inspection by the parties than if they were introduced in evidence. It was presumably for this

[15] The proceeding referred to is the fixing of minimum prices. This is docketed by the Commission as one proceeding, hearings being held *seriatim* with respect to various phases of the process. Hearings relating to the weighted average cost of production have been held, and all the Commission's evidence introduced except the data in question here. The orders of August 31 provide that parties to the proceeding may inspect the cost reports before the taking of testimony is resumed.

reason that petitioners apparently abandoned this argument in the Court of Appeals.

The Commission's opinion states that over 90,000 cost forms had been filed for the years 1936 and 1937. See p. 42, *infra*. The usual method of putting such a mass of material into evidence is to have an expert summarize and compile it in appropriate form and then permit the parties to the proceeding to inspect the original data. *Wigmore on Evidence*, Sec. 1230 (2d ed.); *Berthold-Jennings Lumber Company* v. *St. Louis I. M. & S. Ry. Co.*, 80 F. (2d) 32 (C. C. A. 8th); *Paschen* v. *United States*, 70 F. (2d) 491, 501 (C. C. A. 7th); *Elmer Company* v. *Kemp*, 67 F. (2d) 948, 950 (C. C. A. 9th); *Equitable Life Assurance Society* v. *Sieg*, 53 F. (2d) 318, 319–320 (C. C. A. 6th); *Butler* v. *United States*, 53 F. (2d) 800, 805 (C. C. A. 10th); *Northern Pacific Ry. Co.* v. *Keys*, 91 Fed. 47, 58 (C. C. N. D.).

To avoid encumbering the record with 90,000 forms, the Commission proposed to introduce compilations of the data contained in the forms, and to give the parties to the proceeding an opportunity to examine the originals and to offer them in evidence if they so desire.[16] The Commission could have formally introduced all of the 90,000 reports in evidence and then adjourned the hearing so as to give the parties time to examine them. Instead, it ad-

[16] The Commission has already introduced the compilations in evidence. The hearing is being held open to permit inspection of the reports and cross-examination based upon them.

journed the hearing temporarily first and proposed to permit inspection of the reports by the parties before the hearing was resumed. The result of this reasonable procedure will be to minimize the publicity given the reports, since it may be that many of them will not be formally introduced in evidence. The procedure follows that approved by this Court in *United States ex rel. St. Louis, S. W. Ry. Co.* v. *Interstate Commerce Commission,* 264 U. S. 64, 78–79; it saves time, keeps the record down to a size which is susceptible of being examined, and protects petitioner's rights to the greatest possible degree.

The Commission's orders do not open the cost data to a general inspection; they are strictly limited to "those interested parties who have filed appearances in this proceeding" (R. 7–8). We think that the Congress which authorized the introduction into evidence at hearings of the original reports intended that this more sensible procedure also be available to the Commission, and that Section 10 (a) should be construed accordingly. As the Commission stated in its opinion—

> making available for inspection the underlying cost data to test the accuracy of composite exhibits, which are a summary of the items contained on the Cost Forms, is in effect introducing the underlying data in evidence without unduly encumbering the record.

It is, of course, immaterial whether the inspection takes place in the hearing room, before or after formal introduction of the reports in evidence, or

in more convenient quarters during a temporary adjournment of the hearing. The latter is the course adopted by the Commission in order to avoid a considerable waste of time. Whichever course is pursued, the inspection should properly be regarded as a part of the hearing itself. Under such circumstances the disclosure would seem to be "made in evidence in [a] hearing before the Commission" within the meaning of Section 10 (a) of the Act. It would not be reasonable to impute to Congress an intention to preclude the Commission from permitting a limited number of interested parties from examining the data as a preliminary step to the introduction of compilations at a hearing, while at the same time allowing the Commission to adopt the impracticable course of introducing the original material itself into evidence, thereby making the material open to the whole world.

For these reasons the construction of the statute adopted by the Commission should be approved by this Court.

In any event, if the Commission has power under the Act to put the reports in evidence, petitioners can suffer no injury, irreparable or otherwise, from disclosure in the manner provided. The bill complains of injury from disclosure, not from inspection.

C. The Commission is not estopped from disclosing in hearings the cost data obtained from producers

Petitioners' argument suggests that the Commission induced petitioners to believe that the cost reports filed under Order No. 15 would be kept entirely confidential.

The provisions in Order No. 15 upon which petitioners rely is the statement that (R. 9)—

> The Commission directs specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under this Order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced.

This statement itself, as well as other portions of Order No. 15 quoted *infra,* p. 37, demonstrates that the data was obtained pursuant to the provisions of Section 10, and accordingly cannot be regarded as making the reports any more confidential than does that section.

Petitioners also rely upon the statement at the top of the cost forms (R. 9–10) that—

> This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential.

This statement also makes it plain that the confidential character of the reports is based upon the statute. No producer would be warranted upon the basis of such a statement in assuming that the guarantee of secrecy was any broader in scope than the statutory provision upon which it was based. In any event the cost forms were distributed to producers along with copies of Order No. 15 (R.

9), and the above language in the Form must be read in connection with the more detailed statement in Order No. 15.

Petitioners, of course, assume the risk of their own interpretation of the statute. They cannot impute to the Commission acceptance of this interpretation when the Commission, without attempting to construe the statute in any way, has merely stated that their statutory rights would be recognized. Even without a statement by the Commission of any sort, petitioners would have been required to file cost data and the Commission would have been authorized to use such data to the extent provided by law.

II

THE QUESTION OF JURISDICTION

Throughout this litigation the Commission has sought a decision on the merits of the question of statutory construction so that it might proceed as expeditiously as possible with the fixing of minimum prices. In neither of the lower courts did it brief or argue any question of jurisdiction. Nevertheless, the decision of the Court of Appeals rests mainly on jurisdictional grounds. The Commission is willing to submit the jurisdictional questions thus raised on the basis of the arguments and authorities in that opinion. It desires only to call this Court's attention to a few additional considerations which seem pertinent.

The Bituminous Coal Act twice provides that the circuit courts of appeals shall have exclusive juris-

diction to set aside orders of the National Bituminous Coal Commission. Section 6 (b), (d). In the *Mallory Coal Co.* case, the Court of Appeals, following the decision of this Court in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, held that these provisions did not give the circuit courts of appeals jurisdiction to review procedural or preliminary rulings of the Commission, even though cast in the form of orders. This Court should be reluctant to permit this limitation of the scope of the review provisions in the Act, which narrows the jurisdiction of the circuit courts of appeals, to expand that of the district courts to review Commission decisions.[17] It clearly was not the intention of Congress that the preliminary and procedural decisions of the Commission which were not subject to review in the circuit courts of appeals should be reviewable in the district courts.

[17] In *Shields* v. *Utah Idaho Central R. Co.*, No. 28, Oct. Term, 1938, decided December 5, 1938, this Court held that final determinations of the Interstate Commerce Commission not reviewable under the Urgent Deficiencies Act might be attacked in an ordinary suit for injunction. No further administrative action was called for or possible. The case does not indicate that preliminary or procedural matters not directly assailable under statutory review provisions are to be reviewed by the regular district courts. Such review of preliminary matters would afford "opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions," and would do equal violence to the manifest purpose of the statutory provisions for judicial review. *Cf. Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–384.

The general rule that the administrative process must be completed before equity will interfere, even where damage may ensue to complainants while that process is going on (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Petroleum Exploration, Inc.*, v. *Public Service Commission*, 304 U. S. 209), affords an additional strong reason for limiting the powers of the district courts to enjoin the Commission from making preliminary rulings.

Under such circumstances, the allegations of damage to be suffered if the administrative process continues without interruption should be carefully scrutinized in order that it may be determined whether the damage to complainants is sufficient to justify disregard of the important public policies referred to above.

Examination of the complaint (Paragraph 15, R. 12–13) indicates that the only specific allegations of injury [18] are that disclosure of costs will cause consumers to *demand* lower prices, and that the high cost producers will lose business to low cost producers and have their credit standing impaired. But there is no allegation that the consumers will force producers to sell at the lower prices they demand, or that any of petitioners are high-cost producers. The injury alleged does not follow directly

[18] The general allegation (R. 12) that petitioners' "property right" in the information will be destroyed, and that there will be "great prejudice" and "irreparable injury" to petitioners are, of course, mere conclusions not admitted by the motion to dismiss.

or necessarily from the action of the Commission, but only from the anticipated conduct of other producers and consumers after the disclosure. Taking the allegations of fact to be true, as we must on respondents' motion to dismiss, it is still clear that the injury alleged is remote, speculative, and conjectural. Obviously the cost reports of all producers are to be disclosed at the same time, not merely those of petitioners. And the injury alleged will vanish when minimum prices are fixed.

The recent decision of this Court in *State of California* v. *Latimer,* No. 13, Original, demonstrates that even on a motion to dismiss general allegations of damage may not be sufficient to justify equitable relief. It can be stated equally as well here as in that case with respect to the allegations of irreparable injury that "No supporting detail or specification is given. Such a general statement is not adequate basis for relief on the ground of irreparable damages."

CONCLUSION

Although the Commission realizes that the question of jurisdiction cannot be waived (*United States* v. *Griffin,* 303 U. S. 226, 229), it still would prefer to have the case decided on the merits. If this Court should hold that the Court of Appeals erred in ruling that the District Court lacked jurisdiction, it is respectfully requested that this Court itself pass on the question of statutory construction and not remand the case to the Court of Appeals

for a determination of that question.[19] Such a remand would result in further delay and seriously hinder the Commission in the performance of its statutory duties.

Respectfully submitted.

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[19] This Court has on other occasions passed on the merits of a case after reversing a ruling of a lower court that jurisdiction was lacking. *Dismuke* v. *United States*, 297 U. S. 167; *United States* v. *California*, 297 U. S. 175. In each of those cases, as here, the District Court took jurisdiction and decided the case on the merits and the Court of Appeals reversed for lack of jurisdiction. *Cf. Langnes* v. *Green*, 282 U. S. 531.

APPENDIX

A. Commission Order No. 15, July 15, 1937

United States
Department of the Interior
National Bituminous Coal Commission
Washington, D. C.

Order No. 15

AN ORDER REQUIRING REPORTS FROM PRODUCERS PURSUANT TO SECTION 10 (A) OF THE BITUMINOUS COAL ACT OF 1937

Pursuant to act of Congress entitled "An Act to regulate interstate commerce in bituminous coal, and for other purposes" (Public, No. 48, 75th Cong., 1st sess.), known as the Bituminous Coal Act of 1937, the National Bituminous Coal Commission, in order to perform effectively its duties under said Act, is required to be fully informed as to the production and distribution of bituminous coal throughout the United States. Therefore, pursuant to authority conferred by Section 10 of said Act, the Commission orders and directs as follows:

1. That each producer of bituminous coal, whether or not a code member and whether or not engaged in commerce in coal which is subject to the provisions of Section 4 of said Act, shall file, in duplicate, complete reports showing the total

costs of the tonnage produced and realization prices derived from the sale of coal, all as more fully set forth and specified in the Commission's Cost Forms No. 1 and No. 1–A, such reports to be made separately for each mine and to include all coal produced during the calendar year 1936 and all coal sold during the same period.

2. The Commission's Cost Form No. 1 shall be used by producers for mines having a present actual daily capacity of more than fifty (50) net tons.

The Commission's Cost Form No. 1–A shall be used by producers in making reports for mines having a present actual daily capacity of fifty (50) net tons or less.

In the case of any mine not actually in operation during the calendar year 1936, the producers shall report such data as will show all costs of ownership and maintenance.

3. The Secretary of the Commission shall cause to be mailed to each known producer within the United States a copy of this order, together with necessary forms, and shall make available to all producers additional copies of said forms at the office of the statistical bureau of the Commission in each district established under said act.

4. Each producer shall, within fifteen (15) days from the date of receipt of a copy of this order and of said forms, file the required reports, duly verified, with the statistical bureau of the Commission in the district within which the mine or mines reported upon are located.

The Commission directs specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under

this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced.

By order of the Commission.

Dated this 15th day of July 1937.

[SEAL] F. WITCHER MCCULLOUGH,
Secretary.

B. FINDINGS AND OPINION OF THE COMMISSION ON PETITION OF MALLORY COAL CO.

BEFORE THE

NATIONAL BITUMINOUS COAL COMMISSION

DOCKET NO. 13

PETITION OF MALLORY COAL COMPANY ET AL. FOR VACATION OF RULING BY THE COMMISSION DATED MARCH 30, 1938, AND REVOCATION OF ITS CONSTRUCTION THEREIN OF SECTION 10 (A) OF THE BITUMINOUS COAL ACT OF 1937

DOCKET NO. 14

ROCHESTER AND PITTSBURGH COAL COMPANY AND EXCEPTION TO RULING OF COMMISSION DATED MARCH 30, 1938

Findings of Fact and Opinion of the Commission

The above entitled proceedings were consolidated for the purpose of hearing which was held before the Commission on May 25, 1938. The petitioners herein seek to vacate a Ruling of the National Bituminous Coal Commission, dated March 30, 1938, construing Section 10 (a) of the Bituminous Coal Act of 1937 and ask that the construction therein set forth permitting the introduction in evidence at a hearing before the Commission of data with respect to 1936 costs of production obtained

from the petitioners, be revoked. This cost information was obtained to be used in connection with the proposal and establishment of minimum prices of coals of code members, and was collected pursuant to the provisions of Section 10 (a) of the Bituminous Coal Act of 1937. The Ruling of the Commission announced that the Commission would in the immediate future give public notice of a hearing to be held to determine the weighted average of the total costs of the tonnage for each minimum price area in the calendar year 1936, adjusted as provided by Section 4, Part II (a) of the Act, at which hearing the individual cost returns would be made available for introduction in evidence to afford interested parties an opportunity to check the accuracy of the determinations of the weighted average of the total costs of the ascertainable tonnage produced in the several districts, created by the Act, in the calendar year 1936.

The cost data of the individual producers was furnished to the Commission on Cost Forms Nos. 1 and 1–A, in compliance with Order No. 15 of the Commission, which order directed—

> * * * specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under this order * * *.

Prominently printed on these Cost Forms in bold type was the note—

> This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential.

These Cost Forms requested information with respect to 96 items of cost and realization.

These forms were completed and filed by the petitioners pursuant to the requirements of Order No. 15 and with their understanding, based on the advice of counsel, that the Act prevented the disclosure of such cost data except in a composite form.

The petitioners contended that they would sustain irreparable damage if their cost information was to be introduced at a hearing or made available in the course of a hearing for inspection by interested parties because, in the opinion of their expert witnesses, customers with a knowledge of a producer's cost would demand low prices; that since certainty of continuous supply is a factor in the purchase of coal and since mines having a low cost of production are considered by a customer to be most likely to supply coal continuously, the producer having a low cost of production would secure much more business which would ordinarily go to the producer having a higher cost of production; that this would cause a loss of business from producer to producer and from district to district; that low cost producers would be able to under-bid high cost producers; that the credit standing of high cost producers would be impaired, rendering it difficult for them to borrow. They also testified that no protection could be afforded even if the information be published without the names of the producers, since the public could readily identify the producer by a comparison of the tonnage on the cost sheets with that published by the Bureau of Mines and other organizations. This testimony was not contraverted.

A representative of the Statistical Division of the Commission testified as to the manner in which

the cost information was collected from the producers and tabulated. In excess of 90,000 verified Cost Forms for the years 1936 and 1937 were filed by producers, both code members and non-code members, with the various Statistical Bureaus of the Commission, and these reports were coded by key numbers, which were kept confidential. The reports were checked for mathematical errors and were carefully edited to note any out-of-line or missing items. If any errors were discovered, the report was returned to the producer for correction and explanation, or the item in error was called to the attention of the producer by correspondence.

The figures on the cost reports were then transcribed to cost plates for transmission to Washington, where the plates were carefully checked and rechecked mathematically, edited and visually inspected for any discrepancies which the staff in Washington was able to detect from their knowledge and experience of production costs in all districts.

The combined totals of the weighted average costs of the individual items reported on the Cost Forms were transcribed from the tabulation plates to report forms for transmission to the District Boards in composite form to enable the District Boards to make their determinations of 1936 costs of production in their respective districts in compliance with the Act. There was introduced into the record a composite form for District No. 20 which is typical in form of the composite reports made up for all districts. The 1937 costs of production were similarly treated.

It is contended by the petitioners that the composite cost reports showing the combined totals of

the weighted average costs of the individual items reported on the Cost Forms transmitted to the District Boards in composite form constitute sufficient evidence to satisfy all of the provisions of the Act and the Due Process Clause of the Constitution. They point out that if the individual Cost Forms of the producers, being the underlying data from which the composites are compiled, are introduced in evidence, the record would be so voluminous and cumbersome that it would be impossible to ever effectively achieve the ends contemplated by the Act. This is not contraverted by any evidence in the record.

It is asserted that the transcription of the individual cost items from the Cost Forms to the cost plates, and thereafter to such composite cost reports, involves only a mathematical computation, and that the individual Cost Forms themselves would serve no useful purpose except to check these mathematical calculations made by the statisticians of the Commission. On the contrary, it appears from the testimony of the representative of the Statistical Division of the Commission that in determining whether certain of the Cost Forms should be returned to producers for correction because of out-of-line or missing items, or in determining whether to accept the cost items as reported, the exercise of judgment and the application of sound statistical practices were employed.

Without such Cost Forms being available, a party interested in the proceedings would have no way of determining whether or not sound judgment was exercised or whether statistical practices were properly applied. The right to test this judgment is doubly important in view of the fact that

the Act clearly contemplates that the verified cost data furnished by the producers should be taken as the basis in determining producers' costs because of the obvious practical impossibility of auditing the books of each of the ten thousand or more producers of coal.

The averment of the petitioners that they prepared and filed the Cost Forms pursuant to Section 4, Part II (a) of the Act, is without merit, because Order No. 15 specifically called for the information under Section 10 (a) of the Act. Under Section 4, Part II (a), the Commission could not have obtained information concerning all of the ascertainable tonnage, but only with respect to the tonnage produced by code members.

The petitioners argue that Section 10 (a) of the Act does not permit the disclosure of producers' costs of production except in proceedings involving suits between individual producers or in suits by the Commission against individual producers, and that even under such circumstances the cost data can only be disclosed by actual introduction in evidence at a hearing, not by making such cost information available for inspection in the course of a hearing. This Section provides that producers' cost data shall not be disclosed—

> * * * without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence at any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission.

By the Ruling complained of, the Commission has interpreted this Section as permitting the introduction in evidence of the cost data in *any* hearing before the Commission or any court.

When the Bill providing for the Act was before Congress the House Committee on Ways and Means (Report #294, February 23, 1937) reported that it was the intention of the Bill to permit the disclosure of these cost returns "only with the consent of the producer *or in evidence at a hearing before the Commission or court.*" It is clear that Congress so intended.

Even if it be conceded that Section 10 (a) is ambiguous and susceptible of a construction that would prohibit the introduction of such data in evidence, nevertheless it must be given the construction that would render it constitutional. Any construction of Section 10 (a) of the Act other than that adopted by the Commission in its Ruling of March 30, 1938, would deprive interested parties of a full and fair hearing in accordance with due process of law.

It is well settled that "due process", within the meaning of the Fifth Amendment of the Federal Constitution, guarantees that a party to a hearing or proceeding is entitled to be confronted with the evidence offered against him and be given an opportunity to examine, refute, or explain the same. The courts have been zealous in safeguarding these rights in an administrative hearing. All parties must be fully apprised of evidence submitted or to be considered and must be given a real opportunity to examine witnesses, inspect documents and other evidence in explanation or rebuttal, for in no other way can a party maintain his rights or his defense.

Interstate Commerce Commission v. *Louisville and Nashville Ry. Co.*, 227 U. S. 88; *Southern Pacific Co.* v. *Bartine*, 1 Fed. (2d) 323; *St. Louis Southwestern Railway Co.* v. *Interstate Commerce Commission*, 264 U. S. 64; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. Although there are many thousands of Cost Forms, there can be no compromise on the grounds of convenience or expediency or because of a natural desire to be rid of harassing detail, and examination of them must be permitted. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292.

There is no requirement that underlying data or individual cost sheets be made part of the record in order to afford a full and fair hearing to parties. They must, however, be available for inspection so that interested parties may be fully apprised of the evidence submitted or to be considered. *Wigmore Treatise on Evidence* (Second Edition, Vol. 2, Sec. 1230); *St. Louis Ry.* v. *Interstate Commerce Commission*, 264 U. S. 64; *Northern Pacific Ry. Co.* v. *Keyes*, 91 Fed. 47 (C. C., N. D. 1898); *Elmer Co.* v. *Kemp*, 67 Fed. (2d) 948; *Paschen* v. *United States*, 70 Fed. (2d) 491; *Berthold-Jennings Lumber Co.* v. *St. Louis Ry. Co.*, 80 Fed. (2d) 32.

In reply to petitioners' contention that if the cost data is admissible at all, Section 10 (a) limits it to actual introduction in evidence at a hearing, the Commission holds that making available for inspection the underlying cost data to test the accuracy of composite exhibits, which are a summary of the items contained on the Cost Forms, is in

effect introducing the underlying data in evidence without unduly encumbering the record. (See cases *supra*). The *New England Divisions Case,* 261 U. S. 184, cited by petitioners, has no application here. The issue was whether or not "typical evidence" constituted competent evidence. In the determination of weighted average cost, typical evidence has no place because each item of cost must be included.

Petitions for leave to intervene in the proceeding by the Rochester and Pittsburgh Coal Company (Docket No. 14) were filed by: Imperial Coal Corporation, Heisley Coal Company, Monroe Coal Company, Ebensburg Coal Company, Allegheny River Mining Company, Ringgold Coal Company, Reid Coal Company, and the Berwind-White Coal Company. These interventions were granted for the reason that all of these producers filed cost data with the Commission as did the petitioners herein.

Petitions for leave to intervene in both Dockets Nos. 13 and 14 in support of the Commission's Ruling, dated March 30, 1938, were filed by and granted to the following municipal corporations: City of Cleveland, City of New York, and City of Chicago. The Consumers' Counsel also appeared and was permitted to be heard in these proceedings.

Petitions for leave to intervene in both Dockets Nos. 13 and 14 in support of said Ruling were filed by the following consumers of bituminous coal: Indiana Gas and Chemical Corporation, Association of American Railroads, American Shortline Railroad Association, and Associated Industries of New York State, Inc. Upon objection of

petitioners to said intervention, the Commission reserved its ruling thereon, permitting such consumers to participate in the hearing. The Commission has sustained such objections and denied the petitions of the consumers to intervene as the consumers did not show any right that might be jeopardized by disclosure of the cost data of the producers.

An appropriate order in the premises will be entered in conformity herewith.

By the National Bituminous Coal Commission.

Dated June 1, 1938.

F. WITCHER MCCULLOUGH,
Secretary.

Commissioner MALONEY, dissenting:

I cannot agree with findings of fact and opinion of the Commission upon the petition of the Mallory Coal Company et al., some of whom are intervenors, and on those findings of fact and the opinion I dissent. However, the petition of applicants should be dismissed and denied, because this kind of procedure is inappropriate for the relief they seek.

C. THE PERTINENT PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937

(50 Stat. 72–90, 15 U. S. C., § 828–851)

SEC. 2. (a) * * * No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission unless it has given reasonable public notice of a hearing and unless it has afforded to interested parties an opportunity to be heard, and unless it

has made findings of fact. Such findings, if supported by substantial evidence, shall be conclusive upon review thereof by any court of the United States.

BITUMINOUS COAL CODE

SEC. 4. The provisions of this section shall be promulgated by the Commission as the "Bituminous Coal Code" and are herein referred to as the code.

Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to, as code members, and the provisions of such code shall apply only to such code members except as otherwise provided by subsection (h) of part II of this section.

For the purpose of carrying out the declared policy of this Act the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal:

* * * * *

PART II—MARKETING

The Commission shall have power to prescribe for code members minimum and maximum prices and marketing rules and regulations, as follows:

(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the

preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.

Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "minimum-price-area table," equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by

the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.

MINIMUM-PRICE-AREA TABLE

Area 1: Eastern Pennsylvania, district 1; western Pennsylvania, district 2; northern West Virginia, district 3; Ohio, district 4; Michigan, district 5; Panhandle, district 6; Southern numbered 1, district 7; Southern numbered 2, district 8; that part of Southeastern district 13, comprising Van Buren, Warren, and McMinn Counties in Tennessee.

Area 2: West Kentucky, district 9; Illinois, district 10; Indiana, district 11; Iowa, district 12.

Area 3: Southeastern, district 13, except Van Buren, Warren, and McMinn Counties in Tennessee.

Area 4: Arkansas-Oklahoma, district 14.

Area 5: Southwestern, district 15.

Area 6: Northern Colorado, district 16; southern Colorado, district 17; New Mexico, district 18.

Area 7: Wyoming, district 19; Utah, district 20.

Area 8: North Dakota and South Dakota, district 21.

Area 9: Montana, district 22.

Area 10: Washington and Alaska, district 23.

The minimum prices so proposed shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the inter-

ests of the consuming public. The procedure for proposal of minimum prices shall be in accordance with rules and regulations to be approved by the Commission.

A schedule of such proposed minimum prices, together with the data upon which they are computed, including, but without limitation, the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify such proposed minimum prices to conform to the requirements of this subsection, which shall serve as the basis for the coordination provided for in the succeeding subsection (b): *Provided,* That all minimum prices proposed for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: *And provided further,* That no minimum price shall be proposed that permits dumping.

As soon as possible after its creation each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect, as accurately as possible, any change or changes which may have been established since January 1, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each

district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices. Thereafter, upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum-price area, exclusive of seasonal changes, the Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public.

Each district board shall, on its own motion or when directed by the Commission, propose reasonable rules and regulations incidental to the sale and distribution, by code members within the district, of coal. Such rules and regulations shall not be inconsistent with the requirements of this section and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, for the purpose of coordination.

(b) District boards shall, under rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the

rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon

establish and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of part II of this section.

(c) When, in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the power to establish maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: *Provided,* That no maximum price shall be established for any mine which shall not yield a fair return on the fair value of the property.

(d) If any code member or district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) or (c) of part II of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of part II of this section. Pending final disposition of

such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act.

* * * * *

SEC. 6. (b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the

hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 346 and 347).

The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(c) If any code member fails or neglects to obey any order of the Commission while the same is in effect, the Commission, in its discretion, may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. * * *

(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as

the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive.

SEC. 8. (a) The members of the Commission are authorized to administer oaths to witnesses appearing before the Commission and to authorize the taking of depositions in any proceedings; and, for the purpose of conducting its investigations, said Commission shall have full power to issue subpenas and subpenas duces tecum, which shall be as nearly as may be in the form of subpenas issued by district courts of the United States. In case of contumacy by or refusal to obey a subpena issued to any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Upon the filing of the application for such aid with the clerk of the court, the court shall, either in term time or vacation, forthwith enter an order of record requiring such person to appear before such court at a time stated in the order, not more than ten days from the entry of the order (unless for good cause shown such time is extended), and show cause why he should not be required to obey such subpena, and upon his failure to show cause it shall be the duty of the court to order such witness to appear before the said Commission and give such testimony or produce such evidence as may be lawfully required by said Commission. * * *

SEC. 10. (a) The Commission may require reports from producers and may use such other

sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission.

(b) Any officer or employee of the Commission or of any district board who shall, in violation of the provisions of subsection (a), make public any information obtained by the Commission or the district board, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $500, or by imprisonment not exceeding six months, or by both fine and imprisonment, in the discretion of the court.

(c) If any producer required by this Act or the code or regulation made thereunder to file a report shall fail to do so within the time fixed for filing the same, and such failure shall continue for fifteen days after notice of such default, the producer shall forfeit to the United States the sum of $50 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury

of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the producer has his principal office or in any district in which he shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeiture.

SEC. 17. As used in this Act—

* * * * *

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

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